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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID CLAASSEN,

Defendant and Appellant.

B210688

(Los Angeles County  
Super. Ct. No. NA072625)

APPEAL from a judgment of the Superior Court of Los Angeles County. James B. Pierce, Judge. Affirmed as modified.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

## INTRODUCTION

A jury convicted defendant and appellant defendant David Claassen (defendant) of one count of attempted murder (Pen. Code, §§ 664/187, subd. (a))<sup>1</sup> and one count of assault with a firearm (§ 245, subd. (a)(2)). The jury found true the special allegations that defendant committed his crimes for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)) (the gang enhancement) and that a principal personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (e)) (the gang firearm enhancement). On appeal, defendant argues that the evidence was insufficient to support the true finding on the gang enhancement, so that both the gang and gang firearm enhancements must be reversed. We conclude that the evidence was sufficient to support the jury's verdict. We order corrections to the trial court's minute order relating to the sentencing and the abstract of judgment, but we affirm the judgment.

## BACKGROUND<sup>2</sup>

### A. The Crime

On November 29, 2006, the victim, James Brooks, was helping Sharee Irvin move out of her apartment at 901 Cerritos Avenue in Long Beach. Ms. Irvin's apartment building on Cerritos shared an alley with apartment buildings that faced onto Alamitos Avenue. Ms. Irvin's car was parked in a carport just off of the alley.

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<sup>1</sup> All statutory references are to the Penal Code, unless stated otherwise.

<sup>2</sup> On appeal, "we must view the evidence in the light most favorable to the verdict and presume the existence of each fact that a rational juror could have found proved by the evidence. [Citation.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 139, fn. 30, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Defendant lived in one of the apartment buildings facing on Alamitos. Mr. Brooks knew defendant, having seen him in the neighborhood several times a day for approximately one year. Ms. Irvin also had seen defendant in the neighborhood. Mr. Brooks knew defendant by the gang moniker “Slim” and believed defendant, although Caucasian, to be a member of the Crazy Latino Boys (CLB) street gang. Defendant, when in the company of other “gang members” (as characterized by Mr. Brooks), had confronted Mr. Brooks in the past, throwing up gang signs and challenging Mr. Brooks with the question, “What’s up, bitch?”

As Mr. Brooks and Ms. Irvin were loading items in Ms. Irvin’s car, defendant approached Mr. Brooks from behind and challenged him with the question, “What’s up, bitch?” Defendant was with two other males,<sup>3</sup> one wearing a black baseball cap and one wearing a black hooded sweatshirt. Mr. Brooks responded, “I ain’t no bitch.” Defendant accused Mr. Brooks of “snitching” and hit Mr. Brooks in the side of the head. Mr. Brooks defended himself, punching defendant in the face and knocking him down. The man in the black hoodie went to help defendant up and told Mr. Brooks, “I’m not going to let you beat up on my homeboy.” Defendant said, “Forget it. Just dump him out.” Mr. Brooks understood this to be an instruction to the others to shoot him.

The man with the black baseball cap pulled out a handgun and began shooting. Ms. Irvin testified that all three of the men had guns and shot at Mr. Brooks. Both Mr. Brooks and Ms. Irvin fled. Mr. Brooks was shot seven times, but he survived the attack. He was hit in the upper torso, the left side, the right hip and the left back. One bullet shattered the bone in his right forearm.

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<sup>3</sup> Gabriel Almanza was codefendant at trial. He was acquitted by the jury on all charges. We omit a recitation of the evidence relating to Mr. Almanza that is not relevant to defendant’s appeal.

## **B. The Gang Evidence**

Detective Todd Johnson, the investigating officer, was assigned to the gang unit of the Long Beach Police Department. He testified that he had contacts with defendant prior to the crime in this case and knew defendant to be an admitted member of CLB.

Detective Hector Gutierrez testified as the prosecution's gang expert. Detective Gutierrez was assigned to the gang enforcement section of the Long Beach Police Department. He specialized in the Eastside Longos (ESL) and Westside Longos criminal street gangs, among others. He testified that ESL was primarily a Hispanic gang of approximately 1,000 members and associates based in the eastern part of the City of Long Beach. The gang used the letters "ESL" as its symbol and the silver, black and gray colors of the Oakland Raiders as its gang colors. Members of the gang used hand signs that resembled an "L" and an "E."

The primary activities of ESL included murder, assault, robbery, car theft, identity theft, prostitution, witness intimidation, and sales of narcotics and firearms. One member of ESL recently was convicted of assault with a firearm and robbery; another member recently was convicted of attempted murder.

Within the larger ESL gang were six to ten "cliques" that had defined geographical areas within the gang's larger territory. Each clique might have particular gestures, graffiti or tattoos that differentiated its members from others within the larger gang. One such clique was CLB, founded in the early 1990s. CLB was located around the intersection of Anaheim Street and Lemon Avenue, including the 900 and 1000 blocks of Cerritos and Alamitos Avenues. The location of the crime in this case was in CLB territory.

In gang parlance, a "snitch" is an informant or someone who testifies in court. Gang members do not like snitches and will use violence against them, often killing them.

Detective Gutierrez testified that defendant was a member of CLB with the moniker Slim Shady or Slim. Although ESL (including CLB) was primarily a Hispanic gang, it had some white and African-American members.

Detective Gutierrez and his partner responded to the scene of the crime in this case. Detective Gutierrez saw that Mr. Brooks, who was African-American, had been shot, and he interviewed Ms. Irvin regarding what she had seen. He was aware that Ms. Irvin had identified defendant as one of the perpetrators.

Based on his interviews with witnesses and the identification of defendant as a perpetrator, Detective Gutierrez opined that defendant committed the crime for the benefit of, at the direction of, or in association with ESL and CLB. Detective Gutierrez explained that he had known defendant for seven to ten years and that defendant had admitted to him on numerous occasions that he was a member of CLB. The crime occurred in CLB territory. Defendant approached Mr. Brooks with the question, “What’s up?,” which Detective Gutierrez characterized as “a direct challenge.” Detective Gutierrez said that gang members might approach and attack someone in an alley if they believed the victim to be a rival gang member or a threat to their criminal organizations.

The prosecutor asked Detective Gutierrez to assume, hypothetically, that defendant’s accomplices in attacking Mr. Brooks were not gang members. Detective Gutierrez testified that his opinion still would be that the crime was committed for the benefit of, at the direction of, or in association with ESL because defendant was asserting his authority within the gang’s territory and was letting everyone know that the gang would use violence and intimidation to maintain control of the area. The attack would intimidate people in the community and dissuade them from informing on or testifying against the gang.

### **C. The Defense Case**

Dontea Rashid testified that he had known defendant for approximately eight years and that he and defendant were “neighborhood friend[s].” On the day of the incident, Mr. Rashid was walking through the alley on his way to the store when he saw a fight between defendant and an African-American man that Mr. Rashid knew by the nickname “J Money.” Defendant was knocked to the ground. J Money got on top of defendant and punched defendant five times in the head and neck. Defendant was able to

regain his feet, and he and J Money resumed fighting. Defendant again fell and got back up. Then, two Hispanic men came from different sides of the alley. One was wearing a black hooded sweater and a baseball cap; the other was wearing a white T-shirt and black or dark blue Dickies pants. The Hispanic man wearing the T-shirt yelled, “Shoot him” or “Shoot him, homes.” Mr. Rashid heard a shot fired and immediately fled. He heard two more shots fired from behind him. He did not see who had the guns. When Mr. Rashid turned back to look, he saw defendant running toward his (defendant’s) house.

Mr. Rashid thought the incident was gang related because the neighborhood was gang infested. The neighborhood was ESL territory. He had heard J Money mention a couple of times that he was in a gang. He did not know defendant as a gang member or gang associate. Mr. Rashid had never seen the two Hispanic men before, but they “appeared to be” ESL gang members.<sup>4</sup>

#### **D. Procedural Background**

Defendant was charged with one count of attempted murder (§§ 664/187, subd. (a)) (count 1) and one count of firearm assault (§ 245, subd. (a)(2)) (count 2). The information specially alleged with respect to both counts a gang enhancement (§ 186.22, subd. (b)(1)(C)) and that defendant personally used a firearm (§ 12022.5). With respect to count 1, the information also specially alleged a gang firearm enhancement (§ 12022.53, subd. (e)). With respect to count 2, the information specially alleged that defendant personally inflicted great bodily injury on a person not an accomplice (§ 12022.7, subd. (a)).

The jury convicted defendant on both counts and found true the gang enhancement allegations as to both counts. The jury also found true the gang firearm enhancement allegation with respect to count 1, and with respect to count 2 the allegation that

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At sentencing, defendant attempted to convince the trial court he was not a gang member. The trial court indicated that even if defendant were not, the gang enhancement applied if the crime was for the benefit of or in association with a gang. (See fn. 7 *post.*)

defendant personally inflicted great bodily injury. The jury found not true the personal firearm use allegations with respect to both counts.

The trial court selected count 1 as the base count and sentenced defendant to 32 years to life in state prison, consisting of the mid term of seven years<sup>5</sup> for the attempted murder and a consecutive term of 25 years to life for the gang firearm enhancement (§ 12022.53, subd. (e)).<sup>6</sup>

With respect to count 2, the trial court imposed the mid term of three years for the firearm assault, and an additional and consecutive term of three years for the great bodily injury enhancement. The trial court stayed the sentence as to count 2 pursuant to section 654.

The trial court imposed a \$1,000 restitution fine; a \$1,000 parole revocation restitution fine, stayed; and a “\$200 security fee.”<sup>7</sup> The trial court ordered defendant to pay Mr. Brooks \$18,000 in victim restitution. The trial court awarded defendant 610 days of presentence credit, consisting of 531 days of actual custody and 79 days of conduct credit. Defendant timely appealed.

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<sup>5</sup> At the sentencing hearing, the trial court orally stated that it was sentencing defendant to the “mid term of seven years.” (§ 664, subd. (a).) The trial court’s minute order and the abstract of judgment erroneously refer to the “upper” term, although they correctly reflect the seven year term. We order the September 9, 2008 minute order and the abstract of judgment corrected accordingly.

<sup>6</sup> The gang firearm enhancement pursuant to section 12022.53, subdivision (e)(1) applies only if the defendant violated the gang enhancement provision (§ 186.22, subdivision (b)). (§ 12022.53, subd. (e)(1)(A).) No separate or additional penalty is imposed for the gang enhancement unless the defendant *personally* used or discharged a firearm. (§ 12022.53, subd. (e)(2); see *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282.) Because the jury found not true the special allegation that defendant personally used a firearm, no additional penalty for the gang enhancement was imposed.

<sup>7</sup> It appears the trial court corrected this error, as its minute order and the abstract of judgment properly reflect a total of \$40 in court security fees.

## DISCUSSION

Section 186.22, subdivision (b)(1) provides for a sentence enhancement for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]” (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) In addition, section 12022.53, subdivision (e) requires the trial court to impose an additional and consecutive term of 25 years to life on a defendant who was a principal in the commission of an offense if (1) another principal in the offense discharged a firearm and caused great bodily injury to a victim, and (2) the defendant violated the gang enhancement provision of section 186.22, subdivision (b).

Defendant contends on appeal the gang firearm enhancement must be reversed because the evidence was insufficient to establish that defendant violated section 186.22, subdivision (b). Specifically, defendant argues that there was insufficient evidence that (1) ESL was a “criminal street gang”; and (2) defendant’s crimes were committed for the benefit of the gang.

“In determining the sufficiency of the evidence, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.]” (*People v. Kelly* (2007) 42 Cal.4th 763, 787-788.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) We will reverse for insufficient evidence only if “““upon no hypothesis whatever is there sufficient substantial evidence to support’ [the conviction].”” (*People v. Manriquez* (2005) 37 Cal.4th 547, 577.) This standard of review applies to gang enhancement findings. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1508; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.)



## A. Criminal Street Gang

Section 186.22, subdivision (f) defines “criminal street gang” to mean “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of [certain enumerated] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (§ 186.22, subd. (f); see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*).) Accordingly, “[t]o prove the existence of a criminal street gang, ‘the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a “pattern of criminal gang activity” by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called “predicate offenses”) . . . [Citation.]’ [Citation.]” (*In re Jose P.* (2003) 106 Cal.App.4th 458, 466-467; accord, *People v. Ortega* (2006) 145 Cal.App.4th 1344, 1355; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1222.) Defendant here challenges the sufficiency of the evidence as to the second (“primary activities”) and third (“pattern of criminal gang activity”) elements.

### 1. Primary Activities

“The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group’s ‘chief’ or ‘principal’ occupations. [Citation.]” (*Sengpadychith, supra*, 26 Cal.4th at p. 323.) “Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute.” (*Id.* at p. 324.) The gang’s primary activities also may be proved by expert testimony where the gang expert’s opinions are based on conversations with gang members (including the defendant), the expert’s own experience investigating gang

crime, and “information from colleagues in [the expert’s] own police department and other law enforcement agencies.” (*Id.* at p. 324.) As the court explained in *People v. Vy*, *supra*, 122 Cal.App.4th at p. 1223, fn. 9, “because the culture and habits of gangs are matters which are ‘sufficiently beyond common experience that the opinion of an expert would assist the trier of fact’ (Evid. Code, § 801, subd. (a)), opinion testimony from a gang expert, subject to the limitations applicable to expert testimony generally, is proper. [Citation.] Such an expert—like other experts—may give opinion testimony that is based upon hearsay, including conversations with gang members as well as with the defendant. [Citations.] Such opinions may also be based upon the expert’s personal investigation of past crimes by gang members and information about gangs learned from the expert’s colleagues or from other law enforcement agencies. [Citations.]”

Detective Gutierrez testified in this case that he had been a police officer in the City of Long Beach for eighteen years. He was assigned to the gang enforcement division, where he specialized in the ESL gang, among others. He taught a class on gangs to Long Beach police officers and had testified as an expert nearly 200 times. He had investigated “hundreds of crimes committed by members of ESL,” during which he had interviewed members of the gang. His testimony demonstrated his familiarity with both the constituency and the culture of ESL.

Detective Gutierrez testified that the primary activities of ESL included murder, assault, robbery, car theft, identity theft, prostitution, witness intimidation, and sales of narcotics and firearms. Most of these activities are specified in section 186.22, subdivisions (e) and (f) as qualifying primary activities. Defendant did not object at trial to either Detective Gutierrez’s qualifications as an expert or the foundation for his testimony. There was thus sufficient evidence to support the jury’s finding on the “primary activities” element.

Defendant relies on *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*). In that case, the appellate court reversed the juvenile court’s true finding on a gang enhancement on the ground that the gang expert’s testimony was insufficient to support the primary activities element. The expert had testified, “I know they’ve [the gang]

committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.'" (*Id.* at p. 611.) The expert did not explain how he knew about the offenses (*id.* at p. 612), and on cross-examination, he conceded that the vast majority of cases relating to the gang involved graffiti, but failed to specify whether the incidents involved misdemeanor or felony vandalism. (*Ibid.*) The expert in *Alexander L.* thus failed to establish the foundation for his testimony, failed to testify that the crimes he cited constituted the gang's primary activities, equivocated on direct examination and contradicted himself on cross-examination. (*Id.* at pp. 611-612; see *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107 [distinguishing *Alexander L.*].)

Here, Detective Gutierrez's testimony suffered none of these deficiencies. Detective Gutierrez had training and experience as a gang expert. He specifically testified as to ESL's primary activities. His years dealing with the gang, his investigations of the gang's crimes, his personal conversations with gang members, and his reviews of field identification cards and other reports sufficed to establish the foundation for his testimony. (See *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.) Accordingly, the decision in *Alexander L.*, *supra*, 149 Cal.App.4th 605, does not alter our conclusion.

## 2. Pattern of Criminal Activity

"A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons. [Citations.]" (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1400, quoting *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1457; see also § 186.22, subd. (e); *People v. Gardeley* (1996) 14 Cal.4th 605, 620-621.)

The prosecution introduced evidence through Detective Gutierrez that two members of ESL were convicted of predicate crimes committed on separate occasions—specifically, firearm assault (§ 186.22, subd. (e)(1)) and attempted murder (§ 186.22, subd. (e)(3)). Defendant neither objected to nor disputed that evidence. No more was required to establish a pattern of criminal activity under section 186.22, subdivision (e). (*People v. Gardeley, supra*, 14 Cal.4th at pp. 621-622; *People v. Duran, supra*, 97 Cal.App.4th at p. 1458.) The evidence was sufficient.

## **B. Benefit of the Gang**

Defendant argues that the prosecution was required to prove “that the crime was for the benefit of a criminal street gang,” and that the evidence failed to establish that element because “[t]he only reasonable conclusion to be drawn [from the evidence] [wa]s that the crime was committed for the benefit of [defendant]” rather than the gang. We disagree with both the premise and the conclusion of defendant’s argument.

Section 186.22, subdivision (b)(1) does not necessarily require evidence that defendant’s crimes were committed for the *benefit* of a criminal street gang. Rather, by its plain terms, section 186.22, subdivision (b)(1) may be satisfied by proof that defendant committed his crimes “for the benefit of, at the direction of, *or in association with*” the gang. (§ 186.22, subd. (b)(1), italics added; *People v. Leon* (2008) 161 Cal.App.4th 149, 163.) A jury can reasonably infer the requisite association from the fact that a defendant committed his or her crime in concert with gang members. (*People v. Leon, supra*, 161 Cal.App.4th at p. 163; *People v. Martinez, supra*, 158 Cal.App.4th at p. 1332; *People v. Romero* (2006) 140 Cal.App.4th 15, 20; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1179.) Similarly, a defendant’s specific intent “to promote, further, or assist in any criminal conduct by gang members” can be proved by evidence that defendant’s own criminal conduct was gang related (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; *People v. Hill* (2006) 142 Cal.App.4th 770, 774), or that defendant “intended to help [a fellow gang member] commit a crime.” (*People v. Romero, supra*, 140 Cal.App.4th at p. 20; see *People v. Morales, supra*, 112 Cal.App.4th at pp. 1198-99.)

Contrary to defendant's argument, there was sufficient evidence in this case that defendant committed his crimes both "for the benefit of" and "in association with" the gang, and that he did so with the requisite intent. The trial evidence established that defendant was an admitted member of CLB, a clique within ESL.<sup>8</sup> The shooting occurred in ESL/CLB territory, in a neighborhood that Mr. Rashid—a defense witness who lived there—characterized as "gang infested."

Defendant approached Mr. Brooks and, with no apparent provocation, challenged him with the question, "What's up, bitch?" and accused him of being a "snitch." According to Mr. Brooks and Ms. Irvin, defendant acted in concert with two accomplices. According to Mr. Brooks, both of defendant's accomplices wore black, a color associated with ESL. Defendant attacked Mr. Brooks, again without apparent provocation. When Mr. Brooks knocked defendant down, one of defendant's accomplices said, "I'm not going to let you beat up on my homeboy." Defendant then said, "Forget it. Just dump him out." The facts that defendant commanded his accomplices to "dump him out," and that one or both of defendant's accomplices then produced firearms and attempted to murder Mr. Brooks, support the inferences that one or both of defendant's accomplices came to the encounter armed; defendant knew one or both of his accomplices were armed; and defendant had a relationship with his accomplices such that one or both of them immediately obeyed defendant's command to murder another human being, in open daylight, in a public alleyway surrounded by apartment buildings.

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<sup>8</sup> Defendant relies on the trial court's statement to defendant during the sentencing hearing, "I'll stipulate that you are not a gang member." Read in context, the trial court was pointing out—in response to defendant's protestations that he was not a gang member—that "one need [not] be a gang member or associate to commit an act for the benefit of, in association with, or at the direction of a street gang." (*People v. Valdez* (1997) 58 Cal.App.4th 494, 505.) In any event, the trial judge was not the trier of fact in this case, and his subjective opinion regarding defendant's gang membership is not the issue on this appeal. Our sole task is to determine whether, on any reasonable theory, substantial evidence supported the jury's true finding on the gang enhancement.

In addition, Detective Gutierrez testified that gangs dealt with perceived “snitches” violently and might kill them. He further testified that, by gunning Mr. Brooks down in the street, defendant was asserting the gang’s domination of its territory and intimidating members of the community so that they would not cooperate with police or testify against gang members.

Accordingly, although there was no evidence as to the identity of defendant’s accomplices,<sup>9</sup> there was ample evidence to permit a reasonable jury to infer that defendant’s accomplices also were gang members, and that the attack on Mr. Brooks was a gang-related crime. (See *People v. Romero* (2008) 44 Cal.4th 386, 412-413 [evidence that crime was committed in rival gang territory sufficient to support conclusion that crime was gang related]; *People v. Gardeley, supra*, 14 Cal.4th at pp. 612-13 [defendant beat man who stopped to urinate in gang territory; such conduct was “a ‘classic’ example of how a gang uses violence to secure its drug-dealing stronghold”]; *People v. Ramirez* (2009) 172 Cal.App.4th 1018, 1038 [expert testimony provided circumstantial evidence to support inference that defendant needed gang’s permission to sell drugs; therefore, narcotics offense was “sufficiently gang-related”]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931 [circumstantial evidence sufficient to support inference that drug offense was gang related].)

Under the authorities cited above, sufficient evidence supported the jury’s conclusion that defendant committed his crimes for the benefit of and in association with the gang. The jury also could reasonably conclude that defendant had the specific intent necessary to satisfy section 186.22, subdivision (b)(1).

Defendant relies on *In re Frank S.* (2006) 141 Cal.App.4th 1192. In that case, the police conducted a traffic stop of a minor riding a bicycle, and discovered that the minor possessed a knife. The minor admitted gang membership. The juvenile court sustained a petition alleging that the minor carried a concealed dirk or dagger, and found true a gang

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<sup>9</sup> As noted *ante*, Mr. Almanza was acquitted of all charges in connection with the incident.

enhancement allegation. (*Id.* at pp. 1194-1195.) The only evidence offered to support the gang enhancement was the fact of minor's gang affiliation, and the testimony of a gang expert that "a gang member would use the knife for protection from rival gang members and to assault rival gangs. When asked how the minor's possession of the knife benefited the [minor's gang], [the expert] responded it helps provide them protection should they be assaulted." (*Id.* at pp. 1195-1196.) The appellate court reversed the gang enhancement, holding such "weak inferences and hypotheticals" insufficient to establish the minor possessed the knife for the benefit of the gang. (*Id.* at p. 1199.)

*In re Frank S.*, *supra*, 141 Cal.App.4th 1192, bears no resemblance to the facts in this case. Here, substantial evidence—not mere speculation—supported the inference that defendant committed his crimes in association with other gang members and for the benefit of his gang. (See *People v. Martinez*, *supra*, 158 Cal.App.4th at p. 1333.)

Defendant also relies on *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*). That case, however, did not concern the sufficiency of the evidence to support a gang enhancement—the gang enhancement in that case was dismissed by the trial court after it granted defendant's motion for a new trial. The issue addressed by the Court of Appeal was whether the trial court erred in admitting gang evidence that was so "completely irrelevant and highly prejudicial" that it violated the defendant's constitutional right to a fair trial. (*Id.* at p. 217, 222; see *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7 ["It is axiomatic that cases are not authority for propositions not considered"].)

To the extent defendant argues by analogy, *Albarran*, *supra*, 149 Cal.App.4th 214, is factually distinguishable. In that case, two men shot—at night and from a distance—at a house where a birthday party was being held. (*Id.* at p. 217.) The prosecution's gang expert testified that the shooting was gang related because it would enhance the gang's and the shooters' reputations. (*Id.* at p. 227.) But, the appellate court observed, "there was insufficient evidence to support the contention that this shooting was done with the intent to gain respect. On the contrary, the motive for the underlying crimes . . . was not apparent from the circumstances of the crime. The shooting occurred at a private

birthday party for [one victim's] cousin. Although according to [the gang expert], [that victim] was a member of the Pierce Boys Gang, [the victim's] gang did not have any known or relevant gang rivalries. . . . [T]his shooting presented no signs of gang members' efforts [to enhance his reputation]—there was no evidence the shooters announced their presence or purpose—before, during or after the shooting. There was no evidence presented that any gang members had 'bragged' about their involvement or created graffiti and took credit for it. In fact, [at a pretrial hearing, the gang expert] conceded he did not know the reason for the shooting, though he had 'heard' that gang members were present at the party. There is nothing inherent in the facts of the shooting to suggest any specific gang motive. In the final analysis, the only evidence to support the respect motive is the fact of the [defendant's] gang affiliation.” (*Ibid.*, fn. omitted.)

Unlike *Albarran*, *supra*, 149 Cal.App.4th 214, the crime here occurred in defendant's own gang territory in broad daylight. Defendant was known in the neighborhood, and he knew his victim, whom he accused of being a snitch. Defendant acted in concert with two accomplices, both of whom wore a color associated with the gang, and the evidence strongly supported the inference that defendant knew that at least one of his accomplices was armed. That accomplice shot Mr. Brooks at defendant's command. There was, as discussed, substantial evidence to support the conclusion that the crime was in association with and for the benefit of the gang. This case is not similar to *Albarran*.

Finally, defendant relies on *People v. Killebrew* (2002) 103 Cal.App.4th 644 for the proposition that an “expert opinion about [defendant's] intent, coupled with the expert's opinion as to [defendant's] status as a gang member,” is insufficient to sustain the gang enhancement. Assuming defendant correctly states the law, he does not describe the evidence in this case. As discussed, the jury's conclusion on the gang enhancement was supported not only by the opinion testimony of Detective Gutierrez, but by the percipient testimony of Mr. Brooks, Ms. Irvin and Mr. Rashid, as well as defendant's prior admissions of gang membership to police. Defendant's challenge to the sufficiency of the evidence therefore fails.



**DISPOSITION**

We order the trial court's minute order dated September 9, 2008 and the abstract of judgment corrected to reflect that defendant was sentenced to the mid term, rather than the upper term, on count 1. The clerk of the Superior Court is to prepare a corrected abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.